

## STATE OF IDAHO HARDWARE AND SOFTWARE TERMS AND CONDITIONS

The state of Idaho, by and through its statutory agent, the Administrator of the Division of Purchasing, within the Department of Administration, (the "State"), on behalf of the State of Idaho Agency named elsewhere in this Agreement (the "State Agency"), subject to the following terms of this Agreement (the "Agreement"), contracts with the Contractor named elsewhere in this Agreement (the "Contractor"), for the purchase (including installment purchase) or lease of personal property items set forth in the Schedule attached hereto and incorporated in full, hereafter referred to as "Products." These Hardware and Software Terms and Conditions are in addition to the State of Idaho's Standard Contract Terms and Conditions found on the Internet at <http://www2.state.id.us/adm.purchasing>, incorporated into and made part of this bid and any ensuing contract. In the event of any conflict between these Hardware and Software Terms and Conditions and the Standard Terms and Conditions, these Hardware and Software Terms and Conditions shall prevail.

### 1. DEFINITIONS.

As used in this Agreement.

A. "Commercial Computer Software" means Computer Software that is used regularly for other than government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices (i.e., that can be considered "shrinkwrap") or Computer Software that does not constitute Special Products and is regularly sold, licensed or leased by the Contractor to governmental entities to meet governmental requirements (i.e., that can be considered "shrinkwrap").

B. "Computer" means a Data processing device capable of accepting Data, performing prescribed operations on the Data, and supplying the results of these operations; for example, a device that operates on discrete Data by performing arithmetic and logic processes on the Data, or a device that operates on analog Data by performing physical processes on the Data.

C. "Computer Data Base" means a collection of Data in a form capable of being processed and operated on a Computer.

D. "Computer Program" means a series of instructions or statements in a form acceptable to a Computer, processor, or controller that is designed to cause the Computer, processor, or controller to execute an operation or operations. Computer Programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs and ADPE Maintenance/Diagnostics programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs and the like. Computer Programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

E. "Computer Software" or "Software" means Computer Programs and Computer Data Bases.

F. "Computer Software Documentation" means technical Data, including Computer listings and printouts, in human-readable form that:

- (1) Documents the design or details the Computer Software;
- (2) Explains the capabilities of the Software; or
- (3) Provides operating instructions for using the Software to obtain desired results from a Computer.

G. "Data" means recorded information, regardless of form or method of recording.

H. "Hardware" includes Computers, printers, attached equipment or other equipment utilized for the State's intended purpose.

I. "Products" includes Software, Hardware, equipment, options, documentation, accessories, supplies, spare parts and upgrades.

J. "Special Products" are Products that have been modified by mutual agreement to meet the State's requested changes.

K. "Support" includes Hardware maintenance and repair (outside any required by any applicable warranty), Software updates, maintenance and support services, consulting, training and other support services provided by or through Contractor.

2. SAVE HARMLESS. Subject to the limits set forth in Sections 7.B.(6) and 7.C of this Agreement, the Contractor shall indemnify and hold harmless the State of Idaho from any and all liability, claims, damages, costs, expenses, and actions, including reasonable attorneys' fees, that are caused by or arise from, the negligent or wrongful acts or omissions of the Contractor and its Subcontractors under this Agreement and that cause death or injury or damage to property or that arise out of a failure to comply with any state or federal statute, law, regulation or act.

### 3. SOFTWARE LICENSE.

In this section on Software Licenses, the term "Use" means storing, loading, installing, executing or displaying Software on a Computer, processor, or controller, or making a copy of Software for archival or backup purposes only.

A. Contractor grants State a personal, non-transferable and non-exclusive right to use, in object code form, all Software and related documentation furnished to State under this Agreement. This grant shall be limited to use with the Hardware or Products for which the Software was obtained, or on a temporary basis, on back-up equipment when the original Hardware or Product is inoperable. Use of Software on multiple processors is prohibited unless otherwise agreed to in writing by Contractor.

B. State agrees to use its best efforts to see that its employees and users of all Software licensed hereunder comply with the terms and conditions set out in this Agreement. State also agrees to refrain from taking any steps, such as reverse assembly or reverse compilation, to derive a source code equivalent of the Software.

C. State is permitted to make a single archive copy of Software. Any copy must contain the same copyright notice and proprietary markings that are on the original Software.

D. Use of Software on any Products other than that for which it was obtained, removal of Software from the United States, or any other material breach shall automatically terminate this license.

E. The terms and conditions of a standard software license agreement applicable to Commercial Computer Software acquired under this Agreement may apply to the extent such terms or conditions do not materially change the terms or conditions of this Agreement. In the event of any conflict between the terms or conditions of this Agreement and the Contractor's standard software license agreement, the terms or conditions of this Agreement shall take priority and control, provided, however, without limitation, that the provisions of this Agreement relating to choice of law found at Section 31 of the State's Standard Contract Terms and Conditions, the remedy for copyright infringement found at Section 25 of the State's Standard Contract Terms and Conditions and

## STATE OF IDAHO HARDWARE AND SOFTWARE TERMS AND CONDITIONS

the Exclusive Remedies and Limitation of Liability at Section 7 herein shall apply in all cases and supersede any provisions contained in Contractor's software licensing agreement or any other agreement.

F. State's license includes the right to updates, upgrades, or other enhancements. The Contractor reserves the right to an additional license fee for such update, upgrades, or other enhancements.

G. Software bundled with any other Product may be used only with the Product and with the configuration in which the Product is sold by Contractor or subsequently upgraded by Contractor.

H. State's license infers no title or ownership in the Software and no rights in any associated source code, unless otherwise agreed to in writing by the parties, and will not be construed as a sale of any ownership rights in Software, unless such Software is being developed or modified exclusively as a Special Product in response to the State's bidding documents.

I. State may use the Software with the Computer for which or with which it was acquired, including use at any government installation to which the Computer may be transferred by the State. The State may use the Software with the backup Computer if the Computer for which or with which it was acquired is inoperative.

#### 4. USE OF SOFTWARE AND INFORMATION.

A. State agrees that any Software or technical and business information ("Information") owned by Contractor or its suppliers and furnished to State under this Agreement shall remain the property of Contractor or the supplier.

B. All Software and information furnished to State under this Agreement:

- (1) shall be used by State only to install, operate or maintain the Product for which they were originally furnished;
- (2) shall not be reproduced or copied, in whole or in part, except as necessary for use as authorized under this Agreement; and
- (3) shall, together with any copies except one (1) copy for archival purposes containing State's business records, be returned or destroyed when no longer needed or permitted for use with the Product for which they were initially furnished; and

C. All Software and information designated as "confidential" or "proprietary" shall be kept in confidence except for any part that:

- (1) is rightfully obtained by State free of any obligation to keep in confidence;
- (2) becomes generally known to the public through acts not attributable to State;
- (3) is independently developed by State, or
- (4) is subject to disclosure in accordance with the provisions of the Idaho Public Records Act.

D. (1) Within the United States, a Software or program license may be transferred to another location within the State's organization upon written notice to Contractor without additional costs. All other transfers, including a Software or program license outside the United States, shall be permitted only with Contractor's prior written consent which consent shall not be unreasonably withheld and shall be subject to Contractor's standard transfer fee in effect at the time of the transfer.

(2) The rights granted herein are restricted for use solely by State. State may not authorize or allow the use or marketing of the Software/Programs by a third party, and may not assign or transfer the Software or programs to a third party, without the prior written consent of Contractor. The new end user must agree in writing to Contractor's terms and conditions respecting ownership, use and confidentiality of Software and information and to payment of any scheduled fees.

E. Special Products, if sought in the State's bidding documents, are being developed or modified exclusively for the State, and such Special Products, all related Data, all copyrights in Special Products and derivative works belongs exclusively to the State and are hereby transferred to the State.

#### 5. WARRANTIES.

A. Product warranties shall include the following at a minimum:

(1) On the delivery date the Products and the associated computer operating system Software (basic Software acquired with the equipment that enables equipment to function) will be in good working order and in accordance with Contractor's standard specifications. Unless otherwise specified in the State's bidding documents, the warranty for other suppliers' Commercial Computer Software is included in the supplier's software package and is provided directly from the supplier.

(2) The warranty period shall be as specified in the State's bidding documents and shall begin on the day following successful installation. If no warranty period is specified, the warranty period shall be Contractor's standard warranty period for the Products ordered, commencing the day following successful installation.

(3) State shall notify Contractor if any Product is not in good working order during the warranty period. Contractor will, at its option, either repair or replace any Product not in good working order without charge to State. Repair or replacement Products will be new or equivalent to new in performance and fully warranted the same as new. All returned Products will become the property of Contractor at the time the Product is picked up by Contractor or placed in shipment to Contractor.

(4) The service provided during the warranty period is dependent upon the applicable warranty option selected by State and indicated in the State's bidding documents. If no warranty option is indicated, Contractor will provide the warranty service that is Contractor's standard for such Product, unless otherwise agreed to by the parties.

(5) If the State requires warranty service other than under this Agreement, it shall be agreed to in writing by the parties at rates agreed to in such writing.

B. Software warranties shall include the following at a minimum:

(1) Contractor warrants the tapes, diskettes or other media to be free of defects in materials and workmanship under normal use for ninety (90) days from the delivery date unless otherwise agreed to in writing by the parties. Contractor will replace without charge any Contractor supplied tapes, diskettes or other media that is not in good working order, during the warranty period, if returned to Contractor. If Contractor is unable to replace the Software, Contractor will refund the full amount paid for the use of the Contractor Software.

(2) In addition to the warranty exclusions stated in Section 6, Contractor does not warrant that the operation of Products acquired under this Agreement will be uninterrupted or error free, or that the Software functions will meet State's requirements unless a Special Product Software. Although Contractor has used reasonable efforts to minimize defects or errors in the Software, State assumes the risk of any damage or loss from the use of or inability to use the Software.

(3) For any Special Product Software provided pursuant to this Agreement, Contractor warrants that for a period of one (1) year after the State accepts the Special Product Software, the Special Product Software will operate and perform error free as the Special Product Software solution for the named State Agency, and in accordance with the functions and specifications as set forth in the Agreement. This express warranty applies only if the State specifically identifies in its specifications the Hardware on which the Special Product Software will be used or if the Special Product Software is used in connection with Hardware acquired in connection with this Agreement.

C. Contractor warrants that its Support and customer service and assistance will be performed in accordance with generally accepted industry standards. This warranty shall be valid for ninety (90) days from the date Support is provided or performance of the service. For a period of ninety (90) days after delivery or ninety (90) days after delivery and Contractor's successful installation, Contractor or its suppliers will provide telephone assistance to State during State's normal business hours unless otherwise agreed to in writing by the parties.

#### 6. WARRANTY EXCLUSIONS.

STATE OF IDAHO HARDWARE AND SOFTWARE TERMS AND CONDITIONS

A. EXCEPT AS STATED IN SECTION 5, CONTRACTOR, ITS PARENT, SUBSIDIARIES AND THEIR AFFILIATES, SUB-CONTRACTORS AND SUPPLIERS MAKE NO WARRANTIES, EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIM ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

B. The warranty provided in Section 5 does not cover repair for damages, malfunctions or service failures caused by:

- (1) actions of non-Contractor personnel;
- (2) failure to follow Contractor's installation, operation or maintenance instructions previously provided to State;
- (3) attachment to the Products of non-Contractor products or failure of products not maintained by Contractor unless such installation or use is approved in writing by the Contractor; or
- (4) Force Majeure conditions set forth in Section 30 of the State's Standard Contract Terms and Conditions.

7. EXCLUSIVE REMEDIES AND LIMITATION OF LIABILITY.

A. FOR PURPOSES OF THE EXCLUSIVE REMEDIES AND LIMITATIONS OF LIABILITY SET FORTH IN THIS SECTION 7, "CONTRACTOR" SHALL BE DEEMED TO INCLUDE THE CONTRACTOR AND ITS EMPLOYEES, AGENTS, REPRESENTATIVES, SUBCONTRACTORS, AND SUPPLIERS AND "DAMAGES" SHALL BE DEEMED TO REFER COLLECTIVELY TO ALL INJURY, DAMAGE, LOSS, LIABILITY, EXPENSE OR COST INCURRED.

B. CONTRACTOR'S ENTIRE LIABILITY AND STATE'S EXCLUSIVE REMEDIES AGAINST CONTRACTOR FOR ANY DAMAGES CAUSED BY ANY PRODUCT DEFECT OR FAILURE, OR ARISING FROM THE PERFORMANCE OR NON-PERFORMANCE OF ANY WORK, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, SHALL BE:

(1) FOR INFRINGEMENT, THE REMEDIES SET FORTH IN SECTION 25 OF THE STATE'S STANDARD CONTRACT TERMS AND CONDITIONS.

(2) FOR FAILURE OF PURCHASED OR LEASED PRODUCTS, THE REMEDIES STATED IN SECTION 5 HEREIN. IF CONTRACTOR IS UNABLE, DESPITE REASONABLE EFFORTS, TO REPAIR OR REPLACE, STATE SHALL HAVE THE RIGHT DURING THE WARRANTY PERIOD TO RETURN THE PRODUCTS FOR A REFUND OF THE PURCHASE PRICE.

(3) FOR FAILURE OF SOFTWARE, THE REMEDY STATED IN SECTION 5 HEREIN.

(4) FOR DELAYS IN THE DELIVERY OR SUCCESSFUL PRODUCT INSTALLATION, WHICHEVER IS APPLICABLE, CONTRACTOR SHALL HAVE NO LIABILITY UNLESS THE DELIVERY OR SUCCESSFUL INSTALLATION DATE IS DELAYED BY MORE THAN THIRTY (30) DAYS BY CAUSES NOT ATTRIBUTABLE EITHER TO STATE OR TO FORCE MAJEURE CONDITIONS, IN WHICH CASE STATE SHALL HAVE THE RIGHT, AS ITS REMEDIES:

(a) TO RECOVER DIRECT COSTS INCLUDING REPLACEMENT PRODUCTS, IF ANY, ATTRIBUTABLE TO CONTRACTOR'S DELAY, SPECIFICALLY EXCLUDING INCIDENTAL OR CONSEQUENTIAL DAMAGES; AND

(b) TO CANCEL THE ORDER WITHOUT INCURRING CANCELLATION CHARGES.

(5) FOR PROVEN DAMAGES TO REAL OR TANGIBLE PERSONAL PROPERTY, EXCLUDING THE STATE'S OTHER SOFTWARE, DATA, AND DATA FILES, OR FOR BODILY INJURY OR DEATH TO ANY PERSON NEGLIGENTLY CAUSED BY CONTRACTOR.

(6) FOR CLAIMS OTHER THAN SET FORTH IN 7.B(1) THROUGH 7.B(5), CONTRACTOR'S LIABILITY SHALL BE LIMITED TO DIRECT DAMAGES, NOT TO EXCEED TWO (2) TIMES THE AGREEMENT VALUE OR

ONE (1) MILLION DOLLARS (\$1,000,000.00), WHICHEVER IS GREATER.

C. EXCEPT TO THE EXTENT PROVIDED IN SUBSECTION 7.B(5) ABOVE, CONTRACTOR SHALL NOT BE LIABLE FOR INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, OR FOR LOST PROFITS, SAVINGS OR REVENUES OF ANY KIND, WHETHER OR NOT CONTRACTOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

8. SUPPORT.

A. Except as specifically provided, an order for Support will constitute State's acceptance of the terms of the exhibit for that Support in effect on the date of order. The terms and conditions of a standard support services program agreement (for example, a gold, silver or bronze or similar program) applicable to Products and acquired under this Agreement may apply to the extent such terms or conditions do not materially change the terms or conditions of this Agreement. In the event of any conflict between the terms or conditions of this Agreement and a standard agreement, the terms or conditions of this Agreement shall take priority and control, provided, however, and without limitation, that the provisions of this Agreement relating to choice of law found at Section 31 of the State's Standard Contract Terms and Conditions, and the Exclusive Remedies and Limitation of Liability at Section 7 herein shall apply in all cases and supersede any provisions contained in a standard services agreement or any other agreement.

B. To be eligible for Support, Products must be in good operating condition and at current specified revision levels. Contractor will charge Contractor's standard rates in effect on the date of the Support order to bring non-eligible Products up to these requirements.

C. Contractor may, at no additional charge, modify Products to improve operation and reliability or to meet legal requirements.

D. Relocation of Products is State's responsibility and may result in additional Support charges and modified service response times. Products moved to another county may continue to be serviced subject to availability of a Contractor authorized Support provider.

E. Contractor is not required to provide Support for nonqualified products. "Nonqualified products" are hardware and Software not supplied or approved by Contractor, and Products for which the State does not allow Contractor to incorporate modifications. The State is responsible for removing nonqualified products to allow Contractor to perform Support services.

F. Support does not cover any damage or failure caused by:

(1) media and supplies or use of items not designated for use with Products; or

(2) site conditions that do not conform to Contractor's previously established site specifications; or

(3) neglect, improper use, fire or water damage, electrical disturbances, transportation by State, work or modification by people other than Contractor's employees, subcontractors, or other authorized parties.

G. The State is responsible for the security of its proprietary and confidential information and for maintaining a procedure external to the Products to reconstruct lost or altered files, data or programs. State must have a representative present when Contractor provides Support services. State must notify Contractor if Products are being used in an environment that poses a potential health hazard to Contractor's employees or subcontractors.

STATE OF IDAHO HARDWARE AND SOFTWARE TERMS AND CONDITIONS

State Agency Name and Product Location

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State Agency Billing Address

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Contractor Name and Address

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**PRODUCT SCHEDULE**

Quantity	Description	Unit Price	Extended Price
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Note: This page will be completed by the State when the award is made.